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No. PD-1070-19
Court of Appeals No. 04-18-00856-CR
Trial Court No. B18-073

IN THE COURT OF

CRIMINAL APPEALS

AUSTIN, TEXAS

ROBERT LEE CRIDER, JR.,
Appellant,

vs.

STATE OF TEXAS,
Appellee.

FROM THE FOURTH COURT OF APPEALS, SAN ANTONIO, TEXAS & 198TH JUDICIAL DISTRICT COURT, KERR COUNTY, TEXAS

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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IDENTITY OF PARTIES & COUNSEL

Appellant certifies that the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this appeal:

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Appellee:	The State of Texas
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Appellee's Attorney on Appeal:	Hon. John R. Messinger State Prosecuting Attorney's Office P.O. Box 13046 Austin, Texas 78711
Trial Judge:	Hon. Rex Emerson 198th Judicial District Judge 700 Main Street Kerrville, Texas 78028

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STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that oral argument would be helpful to the Court because the issues raised in Appellant's petition for discretionary review are issues of first impression.

STATEMENT OF THE CASE

Appellant, Robert Lee Crider, Jr., is appealing his conviction for the felony offense of driving while intoxicated (enhanced). CR, 125. Appellant was convicted of this offense by a jury on September 12, 2018. CR, 112. The trial court sentenced Appellant to 70 years in the Texas Department of Criminal Justice – Institutional Division on October 26, 2018. CR, 122. Appellant appealed the trial court's judgment to the Fourth Court of Appeals. On September 4, 2019, the Fourth Court of Appeals affirmed the trial court's judgment in an unpublished opinion authored by Chief Justice Marion.

SUMMARY OF THE ARGUMENTS

The law holds that when the government obtains a person's blood and then tests that blood, two discrete searches have occurred for Fourth Amendment purposes. Therefore, any warrant authorizing the drawing of blood must also expressly authorize the testing of blood. A warrant that fails to authorize both of these actions by the government is inadequate. The warrant in Appellant's case authorized a blood draw but failed to authorize testing of the blood. The Fourth Court of Appeals, therefore, erred in determining that the trial court failed to abuse its discretion in denying Appellant's motion to suppress.

APPELLANT'S ISSUE PRESENTED FOR REVIEW

I. In an issue of first impression, did the court of appeals correctly hold that a blood search warrant does not need to authorize both the drawing of blood and the testing of blood despite the Court of Criminal Appeals holding that the drawing of blood and testing of blood by the government are each discrete searches implicating a defendant's Fourth Amendment rights?

****** For purposes of reference in the Appellant's brief the following will be the style used in referring to the record:

1. Reference to any portion of the Court Reporter's Statement of Facts will be denoted as "(RR____, ____)," representing volume and page number, respectively.

2. The Transcript containing the District Clerk's recorded documents will be denoted as "(CR___, ___)."

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that this brief contains 3,500 words (counting all parts of the document and relying upon the word count feature in the software used to draft this brief). The body text is in 14 point font and the footnote text is in 12 point font.

/s/ M. Patrick Maguire
M. Patrick Maguire,
Attorney for Appellant

APPELLANT'S REPLY TO STATE'S BRIEF ON THE MERITS

1. Appellee Seeks to Legitimize General Search Warrants

Appellee states that "[r]eading a seizure warrant to authorize analysis within its scope is reasonable, or 'What did you think they were going to do with it?'" *Appellee's Brief, pg. 4*. The question posed by Appellee could be rephrased to ask "What can't they do with it?" when it comes to blood evidence.

The Fourth Amendment prohibits the issuance of general warrants allowing officials to rummage through a person's possessions looking for any evidence of a crime. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). The Fourth Amendment's prohibition on general search warrants is particularly relevant when addressing Appellee's argument.

The goal of a blood search warrant is not the blood; it is the information contained within the blood. In *Martinez*, this Court recognized the distinction between the blood itself and the blood's "informational dimension." *State v. Martinez*, 570 S.W.3d 278, 292 (Tex. Crim. App. 2019). The "informational dimension" consists of the private facts contained in the blood. *Id*. at 289. The *Martinez* Court held "[w]e agree with Appellee's argument that the Supreme Court considers the analysis of biological samples, such as blood, as

a search infringing upon privacy interests subject to the Fourth Amendment." *Id*. at 290 (emphasis added).

Following Appellee's argument through to its logical conclusion, we must assume that the government will not seek any information from a blood sample other than what is "implied" by the search warrant.

Appellee's argument essentially seeks to legitimize general search warrants. This argument raises two troubling questions. What's to stop the government from retaining blood samples for future analysis or for whatever purpose the government may deem "reasonable"? In such a case, who decides what constitutes "reasonableness"? These questions cut to the heart of why general search warrants are prohibited by the Fourth Amendment.

It goes without saying that our Constitution is predicated upon the idea that government should not be allowed to police itself. Our Constitution and the judiciary are the "guardrails" framing the boundaries of permissible conduct by the government. This is manifested by the Fourth Amendment's requirement for clear, specific, search warrants outlining what the government may seize; and in the case of blood or biological evidence, what information the State may retrieve from the blood or biological evidence.

2. Washington Supreme Court and State v. Martines

Appellee cites case authority from other states suggesting that a warrant authorizing the drawing of blood also implicitly authorizes the testing of blood (even if the latter is not mentioned in the warrant). *Appellee's Brief, pp. 5-6*. Appellee cites the Washington Supreme Court case of *State v. Martines* in support of its argument that a commonsense reading of a blood draw warrant also implies authorization for testing. *Id*. at 5. The *Martines* court held that "[a] warrant authorizing a blood draw necessarily authorizes blood testing, consistent with and confined to the finding of probable cause." *State v. Martines*, 355 P.3d 1111, 1115 (2015).

The United States Supreme Court has acknowledged that the government's testing of biological evidence is a distinct search separate from the initial gathering of the evidence. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 617 (1989). The *Martines* court, however, failed to even address the Supreme Court's holding in *Skinner*, disregarding it entirely; and with comparatively little analysis, concluded that because "[t]he purpose of the warrant was to draw a sample of blood from Martines to obtain evidence of DUI," it would not be "sensible to read the warrant in a way that stops short of obtaining that evidence." *State v. Martines*, 355 P.3d 1111, 1115 (2015). Notably, the *Martines* court opined that testing of a defendant's blood has to

be "confined to the finding of probable cause," although it offered no direct authority for that proposition. *Id*.

It follows that if the Washington Supreme Court found that testing of a defendant's blood must be "confined to the finding of probable cause" then the court recognized that there is some expectation of privacy at play (i.e., a search) which limits the scope of the testing. If that is the case, it makes no sense why this requirement would not be included in the search warrant, which is the sole authority for the government to test the blood in the first place.

To the extent that Appellee urges this Court to follow trends in other states that hold a blood warrant authorizing the drawing of a person's blood implicitly authorizes testing of the blood (even if the latter is not mentioned in the warrant), Appellant submits those other states got it wrong. These trends run counter to the holding of this Court and such a position runs contrary to clear statements from the Supreme Court. *See, e.g., People v. King*, 663 N.Y.S.2d 610, 614 (N.Y. App. Div. 1997) (holding that privacy concerns are no longer relevant once the blood sample has been lawfully removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person); *cf. State v. Martinez*, 570 S.W.3d 278, 284 (Tex. Crim. App. 2019) (holding that the

testing of a defendant's blood by the government is a "search" for Fourth Amendment purposes); *see also Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 616 (1989) (stating "[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests).

3. Biological Evidence vs. Non-Biological Evidence

Appellee conflates case authority dealing with the testing of non-biological evidence such as photographs, cell phones, ballistic evidence and computer data with biological evidence such as blood. There is fairly limited information that can be gleaned from a shell casing or a cell phone, for instance; and the types of information that can be gleaned are generally obvious. There is, however, a plethora of information that can be gleaned from blood and other biological evidence (the person from whom the blood is drawn may be unaware of much of the information).

The Supreme Court has acknowledged the countervailing concern that '"chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an [individual], including whether he or she is epileptic, pregnant, or diabetic'—facts that may be extraneous to any criminal investigative aims." Andrei Nedelcu, *Blood and Privacy: Towards a "Testing-As-Search" Paradigm Under the Fourth Amendment*, 39 SEATTLE

U. L. REV. 195, 209 (2015) (citing *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 617 (1989)). "The latter concern is of paramount importance because, as one scholar has observed, 'a person has no reason to know much of the information that will be revealed when [a biological sample containing DNA] is analyzed. [She] has little to no discretion over what information is stored in her body and likely has not . . . evaluated that information herself.'" *Id*. at 210.

Appellee's approach of comparing biological evidence with non-biological evidence ignores that biological evidence is *sui generis* within the greater taxonomy of evidence. *Id*. at 210. To hold that a blood search warrant implies the government's right to test that blood (when the latter is not mentioned in the warrant) also creates a per se categorical exception to the warrant requirement similar to that which was condemned by the Supreme Court. *Missouri v. McNeely*, 133 S. Ct. 1552, 1561 (2013).

Such an approach also turns on its head the notion that law enforcement should not be in the position to police itself. Once a biological sample is in the possession of law enforcement, unless there is an explicit directive from a magistrate limiting what law enforcement may do with that sample, law enforcement may preserve the sample and do with the sample whatever law enforcement wants to do with it.

Appellee also attempts to analogize blood-draw cases to those involving breath samples. *Appellee's Brief, pp. 10-11*. Appellee argues that because a defendant has no expectation of privacy in a breath sample seeking the defendant's blood-alcohol concentration, so it is with a blood sample. *Id*. Without debating the correctness of Appellee's assertion regarding the expectation of privacy in a breath sample, there is an obvious difference between a breath sample and a blood sample. A blood sample is different because it holds significantly more biological and physiological information than a breath sample. The only information that can be obtained from a breath sample is a person's blood alcohol concentration. Further, this comparison ignores that the method of obtaining a blood sample is far more intrusive than obtaining a breath sample. Thus, the privacy concerns present in a defendant's blood sample are much greater than those in a breath sample.

"'[B]lood is a substance whose evidentiary value lies in its components,' and it 'has no probative value in itself.' Instead, 'it must be examined for its evidentiary value to be understood.' Acknowledging this reality makes it clear that blood is more akin to a 'place' to be searched than a 'thing' to be seized." Andrei Nedelcu, *Blood and Privacy: Towards a "Testing-As-Search" Paradigm Under the Fourth Amendment*, 39 SEATTLE U. L. REV. 195, 212 (2015). "No one would contest that a warrant authorizing

the search of John Doe's home 'for evidence of any and all crimes' could not pass constitutional muster. The same principle holds true here, given that blood is simply a repository for a myriad of potentially incriminating evidence sought by the state. An approach that advocates essentially unrestricted testing is therefore compromised by a fatal constitutional infirmity. This concern about general warrants is particularly critical in light of the fact that '[a]s technology advances, more meaningful information will be extractable from . . . genetic material . . . . [T]he only practical limit on information that can be extracted from biological samples are currently-available analysis techniques and our knowledge of what genetic variations mean.'" *Id*. at 212-13.

4. The Answer is Clear and the Fix is Simple

The fix for this issue is not some herculean task that will complicate matters and hinder law enforcement. To the contrary, the solution could not be simpler. In the same warrant authorizing the taking of a blood sample, the addition of one sentence authorizing law enforcement to test the blood for alcohol or other intoxicants solves the problem. Such a warrant vindicates this Court's holding in *Martinez* that the government's testing of blood is a search under the Fourth Amendment. It also places limits on what may be

done with such a sample. If it's not stated in the warrant, the government cannot do it.

Stated another way, this solution gives clear guidance to the government that any information gleaned from the government's testing of a biological sample must be expressly authorized in a search warrant supported by probable cause. By implication, it would also dictate that any other testing or analysis of a biological sample by the government would need to be authorized in a search warrant.

In *Martinez*, this Court drew a distinction between the blood itself and the blood's "informational dimension." *State v. Martinez*, 570 S.W.3d 278, 292 (Tex. Crim. App. 2019). The "informational dimension" consists of the private facts contained in the blood. *Id*. at 289. In *Martinez*, the Court recognized that a person has a legitimate expectation of privacy in these "private facts" contained within a blood sample, urine sample or DNA sample under the Fourth Amendment. *Id*. (citing *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989); *Maryland v. King*, 569 U.S. 435 (2013); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)). In analyzing this authority, the *Martinez* Court held "[w]e agree with Appellee's argument that the Supreme Court considers the analysis of biological samples,

such as blood, as a search infringing upon privacy interests subject to the Fourth Amendment." *Id*. at 290 (emphasis added).

In *Martinez*, this Court rightly held that the testing of blood by the government constitutes a search under the Fourth Amendment. It follows, therefore, that in order for such a test to pass constitutional muster, said test must either be expressly authorized by a search warrant or justified by a recognized exception to the warrant requirement. It's that simple.

5. This is not Unfamiliar Territory

Appellee's argument is reminiscent of the attempts to justify warrantless blood draws prior to the Supreme Court's ruling in *McNeely*. In *McNeely*, the Supreme Court held that per se categorical exceptions to the Fourth Amendment's warrant requirement are prohibited. *Missouri v. McNeely*, 133 S. Ct. 1552, 1561 (2013). Until the *McNeely* decision, it was generally accepted that warrantless blood draws were proper pursuant to the states' various implied consent statutes. When the Supreme Court squarely addressed the issue in *McNeely*, it constituted a sea change in the way such blood draws were viewed under the Fourth Amendment. However, the *McNeely* decision merely vindicated the Supreme Court's previous holding that in order to lawfully obtain a defendant's blood, there must be a properly

issued search warrant or exigent ("emergency") circumstances. *Schmerber v. California*, 384 U.S. 757 (1966). The same thing holds true here.

The underlying constitutional principles at work are not in dispute. Both the Supreme Court and this Court hold that the government's testing of blood constitutes a search under the Fourth Amendment. The next step is to vindicate this principle by holding that such a search must be authorized by a warrant supported by probable cause.

The alternative is that a judicially-created warrant exception is carved out, unique to blood warrants, providing that a blood search warrant does not need to specify that the government may test blood because testing is "implied" in the warrant. It essentially becomes an endorsement of general search warrants in this context and creates a slippery slope.

If the government seizes blood and decides to enter the defendant's DNA into computer databases it may do so; the government may test for specific genetic traits, or anything else for that matter; there is nothing stopping it. In such a case, the warrant is a "floor" for what law enforcement may do, it is not a "ceiling" setting limits for what law enforcement may not do.

6. Conclusion

Appellee suggests that "[h]olding that a warrant authorizing seizure of BAC implicitly authorizes BAC testing would be the quickest way to resolve this case." *Appellant's Brief, pg. 10*. Appellee's argument rests on the assumption that a blood search warrant does not need to authorize testing because a commonsense reading of such warrants "implies" that the government may test the blood; and that the government will not exceed the boundaries of what is "implied" in the warrant. *Appellant's Brief, pp. 4-5*. In such a scenario, however, the government (not a magistrate) becomes the arbiter of what is "implied" in the warrant. This is anathema to our Constitution.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Honorable Court sustain the appellate contentions herein, reverse the judgment of the Fourth Court of Appeals, and remand this cause to the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on April 30, 2020, a true and correct copy of the above and foregoing document was served on Hon. Scott Monroe, 402 Clearwater Paseo, Kerrville, Texas 78028 via electronic transmission at *scottm@198da.com* and that I have served a true and correct copy of the above and foregoing document to the State's Prosecuting Attorney, Hon. John R. Messinger, P.O. Box 13046, Austin, Texas 78711 via electronic transmission at *john.messinger@spa.texas.gov*.

/s/ M. Patrick Maguire
M. Patrick Maguire

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